

KC1VTEMC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

19 CR 696 (PAE)

6 ARI TEMAN,

7 Defendant.

REMOTE TELECONFERENCE

8 New York, N.Y.  
9 December 1, 2020  
10 10:37 a.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 District Judge

14 APPEARANCES

15 AUDREY STRAUSS,  
16 Acting United States Attorney for the  
17 Southern District of New York  
18 KEDAR S. BHATIA  
19 JACOB GUTWILLIG  
20 Assistant United States Attorneys

21 JOSEPH A. DIRUZZO, III  
22 JUSTIN GELFAND  
23 JUSTINE A. HARRIS  
24 NOAM K. BIALE  
25 Attorneys for Defendant

26 ALSO PRESENT: DANIEL ALESSANDRINO, NYPD

SOUTHERN DISTRICT REPORTERS, P.C. •••••  
(212) 805-0300

KC1VTEMC

1 (Remote teleconference)

2 THE COURT: I'm calling the case of *United States v.*  
3 *Teman*, 19 CR 696.

4 Let me just begin by taking the roll.

5 Who do I have for the government?

6 MR. BHATIA: Your Honor, Kedar Bhatia, for the United  
7 States. I'll be speaking today. And I'm joined on the line by  
8 Jacob Gutwillig, Assistant U.S. Attorney; as well as the case  
9 agent, Detective Daniel Alessandrino.

10 THE COURT: All right. Very good.

11 Mr. Bhatia, for whatever reason, your voice is  
12 projecting as faint. So I will ask you, when you speak, to  
13 speak up. Thank you.

14 Who do I have for the defense?

15 MR. BIALE: Good morning, your Honor.

16 This is Noam Biale, on behalf of Ari Teman.

17 Mr. Teman and I are present on the video link. And on  
18 the phone we have my colleague Justine Harris; and we also have  
19 trial counsel, Justin Gelfand and Joseph DiRuzzo, also joining  
20 us by phone.

21 THE COURT: Very good. All right. Good morning to  
22 all of you.

23 And Mr. Teman, just to confirm for the record that you  
24 are present on the video and can hear and see what's being  
25 said; you can hear and see us all.

KC1VTEMC

1                   THE DEFENDANT: I believe so, your Honor.

2                   THE COURT: Well, I just need to make sure.

3                   THE DEFENDANT: I hear you. I don't know if I'm not  
4 hearing somebody else. But right now everybody who has spoken  
5 I've heard.

6                   THE COURT: Very good. All right. Terrific.

7                   And is our court reporter there?

8                   THE COURT REPORTER: Yes, your Honor. Good morning.

9                   THE COURT: All right. Good morning.

10                  I'm going to ask everyone to speak up. For whatever  
11 reason, Skype today is giving me a low volume for just about  
12 everybody, even though I've got the volume on max. It's  
13 considerably less loud than the court hearing we had just a few  
14 minutes ago in another matter, who knows why.

15                  All right. Let me begin just by welcoming back trial  
16 counsel, Mr. Gelfand, Mr. DiRuzzo and Mr. Bhatia; and welcoming  
17 to the case new counsel, Mr. Biale and Mr. Harris and, of  
18 course, welcoming you, Mr. Teman.

19                  There have been lots and lots of filings on the docket  
20 of this case since trial, but I'm acutely mindful that our last  
21 conference in this case was on the last day of trial, on  
22 January 29th. And boy does that feel like a lifetime ago, with  
23 the intervening public health crisis.

24                  Counsel and Mr. Teman, I just want to say I hope you  
25 and your families and those close to you have been able to stay

KC1VTEMC

1 safe and healthy during these extraordinary eight last months  
2 since the pandemic hit. And with another wave upon us, you  
3 have my wishes as well for continuing good health and safety  
4 for you and yours.

5 I also want to welcome anyone who's auditing this by  
6 telephone. I'm glad at this time, when remote hearings are  
7 requested for good and sound reasons and health and safety, as  
8 Mr. Teman has done so here, that the public is able to attend  
9 our conferences telephonically.

10 Unfortunately, it's not possible for members of the  
11 public to watch by video. Experience has shown that the  
12 platforms used for video access grow more unstable with a  
13 larger number of video participants, even those who just are  
14 watching on the video and not themselves appearing.

15 My fellow judges and I regrettably have had a number  
16 of conferences by video which got scuttled or interrupted by  
17 technology problems. And so our IT staff has advised us not to  
18 overload the number of video attendees.

19 I do need to remind everyone listening that you are  
20 not permitted to record these proceedings. In an in-person  
21 courtroom, that goes without saying, because spectators are not  
22 permitted to bring recording devices into court. But in a  
23 remote proceeding, it's necessary for me to say that, so I just  
24 did. The court reporter is transcribing these proceedings; and  
25 so if anyone would like a copy of the transcript to reconstruct

KC1VTEMC

1 what was said here, you're at liberty to order it.

2 All right. We are here today for the sentencing  
3 hearing in the case of *United States v. Ari Teman*, or at least  
4 to begin the sentencing process in Mr. Teman's case. I say  
5 that because for reasons that I will be taking up with counsel  
6 shortly, I have determined that I don't believe it will be  
7 possible to complete that process today; instead, I think we  
8 will only be able to cover but so much ground.

9 By sheer coincidence, about two minutes before I  
10 jumped on this call, my chambers got an email from Mr. Biale  
11 reaching the same outcome, I think, for a different reason,  
12 having to do with a recent flurry of communications relating to  
13 forfeiture.

14 Mr. Biale, I'm with you. I have no intention of  
15 reaching that issue today. Indeed, I have a homework  
16 assignment for counsel to reflect on involving that very issue.  
17 So what I propose to do is take care of a number of  
18 preliminaries, including one very important one which is going  
19 to occupy counsel, and we will adjourn short of making any  
20 decisions in the case.

21 MR. BIALE: Understood, your Honor.

22 THE COURT: All right. Very good.

23 So before we turn to the substance of the hearing,  
24 which, again, I don't think we're going to get to, there are a  
25 number of preliminary matters I need to take up, so please bear

KC1VTEMC

1 with me.

2 The first involves the remote nature of this  
3 proceeding.

4 We're in the midst of the COVID-19 pandemic. I'm  
5 conducting this proceeding pursuant to the authority granted by  
6 Section 15002 of the CARES Act, and the standing orders issued  
7 by our chief judge pursuant to that act.

8 I'm participating in this conference from the  
9 courthouse in my chambers. Counsel and Mr. Teman are  
10 participating remotely. Mr. Teman and lead counsel for each  
11 side are participating by videoconference. The remaining  
12 counsel are participating by telephone.

13 I will ask everybody to please let me know immediately  
14 if you are having any difficulty hearing the speaker, whether  
15 it's me or an attorney or the defendant when they are speaking;  
16 and as to the video participants, whether you are having any  
17 difficulty seeing the other video participants.

18 I will, even in the truncated nature of this  
19 proceeding, be calling on multiple people during the course of  
20 this proceeding. When I do call on you, I will try to do so  
21 clearly by name. If I haven't done so for some reason or you  
22 otherwise have occasion to speak, including to let us know that  
23 you can't hear or see something adequately, please identify  
24 yourself by name for clarity of the record.

25 And please don't interrupt each other or me during

KC1VTEMC

1 this conference. If we interrupt each other, it becomes  
2 difficult for the court reporter to create an accurate  
3 transcript of these proceedings. I will give counsel obviously  
4 a full opportunity, item-by-item or issue-by-issue, to be  
5 heard.

6 All right. I've been advised that the defendant,  
7 Mr. Teman, cannot participate in person in the usual way today,  
8 that is, by his being physically present in the courtroom,  
9 without incremental risk to himself. And that is as a result  
10 of the COVID pandemic which is surging right now, including in  
11 New York state, where we are; and Florida, where Mr. Teman  
12 resides, and where I understand he is participating from  
13 remotely.

14 Counsel in their submissions have put medical  
15 information before the Court indicating that Mr. Teman has  
16 heightened vulnerability to COVID-19 on account of a  
17 respiratory history. It is also not knowable when the COVID  
18 pandemic will ease up, but there is good reason to doubt that  
19 it will significantly abate in the next month or two.

20 Defense counsel, Mr. Biale, do you agree that for the  
21 Court to conduct this proceeding in person at this time,  
22 requiring Mr. Teman to travel to New York would present  
23 heightened risks to his health?

24 MR. BIALE: Yes, your Honor, I do.

25 THE COURT: Government counsel, do you agree that that

KC1VTEMC

1 is so?

2 MR. BHATIA: Yes.

3 THE COURT: All right.

4 I find that conducting this proceeding in person is  
5 not now -- that is to say in court the usual way, is not  
6 reasonably available. I do find that videoconferencing in the  
7 manner that we are proceeding now, and teleconferencing for the  
8 nonlead counsel participants, is reasonably available; and I  
9 find that the defendant is able to participate in this  
10 proceeding by videoconferencing means.

11 I have received a written waiver of right to be  
12 present in court proceedings. It was filed on Sunday. It has  
13 been docketed at docket 173. I want to confirm with you,  
14 Mr. Biale, that the defendant was advised of his right to  
15 appear in person at this proceeding, that he understood those  
16 rights, and that he voluntarily gave up those rights.

17 MR. BIALE: Yes, your Honor. We fully discussed that  
18 matter with Mr. Teman. And he's voluntarily giving up his  
19 right to be present in person at the proceeding.

20 THE COURT: Okay.

21 And just to make sure that I can make a legally  
22 adequate finding, Mr. Biale, briefly describe how you came to  
23 provide the document to Mr. Teman, and the circumstances under  
24 which you discussed his rights with him.

25 MR. BIALE: Sure, your Honor.

KC1VTEMC

1                   So the discussion has been an ongoing one based on  
2 both Mr. Teman's strong interest in having this case conclude  
3 efficiently and soon, based on the amount of time that he has  
4 been on home detention. At the same time we've discussed with  
5 Mr. Teman his countervailing concern about his health and what  
6 it would mean for him to travel from Florida to New York.

7                   Based on all of those considerations, Mr. Teman  
8 expressed to us that he felt it was not safe for him to travel  
9 and he would prefer to participate in sentencing remotely.

10                  As a result, we made an application to the Court to do  
11 that. As your Honor knows, there was some back and forth  
12 between the defense and the government about that issue. The  
13 Court ultimately granted our request to proceed remotely. We  
14 sent a copy of the Court's order to Mr. Teman, along with the  
15 waiver of rights; and explained that in order to proceed  
16 remotely, he would need to sign the waiver of rights, and one  
17 of us as his counsel would do so, and that we would file it on  
18 the docket. He returned a signed copy of it to us, I signed  
19 it, and then filed it.

20                  THE COURT: All right. Thank you.

21                  That's very comprehensive and helpful.

22                  And that leads me to my next question, which is the  
23 handwriting alongside both signatures leaves something to be  
24 desired.

25                  Mr. Biale, is that Mr. Teman's signature on the

KC1VTEMC

1 document?

2 MR. BIALE: Yes, your Honor.

3 THE COURT: And is it yours?

4 MR. BIALE: It's an electronic signature that I pasted  
5 onto the document.

6 THE COURT: All right. Very good.

7 Mr. Teman, is that indeed your signature on the  
8 document?

9 THE DEFENDANT: Yes, your Honor, that is my signature.

10 THE COURT: I suffer from handwriting deficiencies as  
11 well.

12 Okay. Mr. Teman, did you hear what Mr. Biale just  
13 said to me about the process by which you were informed of your  
14 right to have the sentence proceed in person?

15 THE DEFENDANT: Yes, I did, your Honor.

16 THE COURT: And you did indeed sign a document giving  
17 up your right to be present in person?

18 THE DEFENDANT: Yes, I did, your Honor.

19 THE COURT: Do you understand that you have a right to  
20 have this hearing proceed in person, meaning you and the  
21 lawyers and me, government, we'd all be in person in my  
22 courtroom?

23 THE DEFENDANT: Yes, I do, your Honor.

24 THE COURT: And do you understand that the public  
25 health emergency created by this pandemic has heightened the

KC1VTEMC

1 risks associated with travel and court appearance; and  
2 particularly for persons traveling out of state, you might be  
3 subject to heightened risks, as well as quarantines and the  
4 need for testing and a variety of other inconveniences were  
5 this to occur in person?

6 THE DEFENDANT: Yes, your Honor. And multiple doctors  
7 of mine have made that clear. I think we've --

8 THE COURT: Have you fully discussed these issues and  
9 your rights with Mr. Biale and your other lawyers?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Okay.

12 Do you understand that if we proceed, as we are about  
13 to, by videoconferencing, you and your counsel would still be  
14 able to fully participate in this proceeding; you'd both be  
15 able to fully address the Court. In the event there came a  
16 need for a breakout where you and your counsel -- without being  
17 overheard by anybody else -- could speak privately, we could  
18 make the technology work, even if it means hitting the pause  
19 button and logging back on; but we'd be able to find a way for  
20 you to confer privately with your lawyer or lawyers.

21 Do you understand that?

22 THE DEFENDANT: Yes. Thank you, your Honor.

23 THE COURT: And just to be clear, do you wish to give  
24 up your right to be sentenced in person with your lawyer by  
25 your side?

KC1VTEMC

1                   THE DEFENDANT: Yes, your Honor.

2                   THE COURT: All right. I find a knowing and voluntary  
3 waiver of Mr. Teman's rights to be present in person for this  
4 sentencing.

5                   Finally, as to this issue, for us to proceed today,  
6 even if it means just undertaking some of the sentencing  
7 process, I'm required to make a finding that this proceeding  
8 can't be delayed without harm to the interests of justice.

9                   Defense counsel, in your letter of November 20th,  
10 docketed at docket 167, you told me that Mr. Teman's mental  
11 health would be benefited by moving the case forward. You  
12 wrote: "while the Court in its November 19, 2020 order invited  
13 a request to adjourn sentencing, Mr. Teman's countervailing  
14 mental health concerns compel us to request that sentencing  
15 proceed on the current schedule. We plan to provide the Court  
16 with additional material regarding Mr. Teman's mental health  
17 early next week. But it suffices to say for now that the  
18 ongoing pendency of the case has significantly exacerbated  
19 ongoing struggles to such a degree that we believe it is  
20 important for Mr. Teman not to delay resolution of this matter  
21 further."

22                   Purely in the interest of a clear record, Mr. Biale,  
23 can you just elaborate a little bit.

24                   MR. BIALE: Yes, your Honor.

25                   So we've had extensive discussions with Mr. Teman

KC1VTEMC

1 since Ms. Harris and I joined the case. And before that, his  
2 trial counsel had extensive discussions with him.

3 As your Honor knows, Mr. Teman has been on home  
4 detention since the trial verdict in January. He has  
5 essentially been solitary for that time, because his partner  
6 had to leave the country. So he is alone there. He has his  
7 dog who provides a great deal of comfort.

8 But the isolation that we are all experiencing due to  
9 the COVID pandemic, for Mr. Teman has been significantly  
10 harder. The various mental health issues that have been raised  
11 before the Court -- both in the sealed submissions with trial  
12 counsels' sentencing submission that was submitted in July, as  
13 well as the letter from Mr. Teman's parents, which we submitted  
14 last week in connection with our request for remote  
15 sentencing -- I think speak to the particular difficulties that  
16 Mr. Teman has with coping with the ongoing uncertainty  
17 regarding this case.

18 I can speak just personally based on my conversations  
19 with him that I have seen him struggle to a degree that is  
20 quite profound and sets him apart from most of the clients I  
21 have. No doubt, having a sentencing hanging over their heads  
22 is a difficult process. For Mr. Teman it's really been  
23 harrowing. And I don't think that it serves his interests or  
24 the public interest to delay further.

25 Now, I stand by all that, in spite of the discussion

KC1VTEMC

1 that we're going to have in a moment about a brief adjournment.  
2 But I think that all of that stands as a reason to proceed with  
3 sentencing as soon as practicable, and to do so remotely given  
4 that we cannot convene in person safely.

5 THE COURT: And I take it, Mr. Biale, that extends to  
6 accomplishing what little we can here before an adjournment.

7 MR. BIALE: Yes, your Honor.

8 THE COURT: All right. Very good.

9 Look, I'm fully persuaded by that. Let me just  
10 confirm that the government is too.

11 MR. BHATIA: Yes, your Honor.

12 I mean, I think we take a different view,  
13 respectfully; but if your Honor were to make the CARES Act  
14 findings, I think you --

15 THE COURT: All right. Look, I make the finding --  
16 Mr. Biale, thank you. That was a very persuasive and clear  
17 articulation.

18 I find that the sentencing proceeding cannot be  
19 further delayed without harm to the interests of justice. I  
20 fully accept counsel's proffer -- which is supported, among  
21 other things, by the letter from Mr. Teman's parents -- that  
22 Mr. Teman is struggling with the pendency of this matter, and  
23 he would like to put this case behind him. I credit that. I  
24 credit that forward progress will be good for his state of  
25 mind. I hope that commencing the sentencing process today,

KC1VTEMC

1 even if we can't finish it or won't be able to finish it, will  
2 give you, Mr. Teman, some additional peace of mind that at  
3 least we are moving forward.

4 All right. The next preliminary matter I need to take  
5 up involves new Federal Rule of Criminal Procedure 5(f).

6 As counsel are aware, in late October, the President  
7 signed the Due Process Protections Act. It put Rule 5(f) in  
8 place. It requires the Court at the initial scheduled  
9 conference in a criminal case to advise the prosecution of its  
10 obligations under *Brady v. Maryland* and its progeny, and to  
11 issue a written order to the same effect.

12 Like most other judges in this district, I've taken  
13 the view that the best practice is to treat Rule 5(f) to apply  
14 to existing cases and not merely new ones. So I've docketed  
15 the written Rule 5(f) order in all my pending criminal cases,  
16 including this one. I did so in this case on October 30th.  
17 The order is docketed at docket 153.

18 And now I'm going to make the companion oral  
19 notification that's also required by Rule 5(f).

20 And, Mr. Bhatia, fair warning, at the end of this I'm  
21 going to ask you whether the government understands its *Brady*  
22 obligations and whether it has complied with them.

23 All right. Here it goes.

24 Pursuant to Federal Rule of Criminal Procedure 5(f), I  
25 remind the government of its obligation under *Brady v. Maryland*

KC1VTEMC

1 and its progeny to disclose to the defense all information,  
2 whether admissible or not, that is "favorable to" the  
3 defendant, "material either to guilt or to punishment," and  
4 known to the government.

5 The government must make good-faith efforts to  
6 disclose such information to the defense as soon as reasonably  
7 possible after its existence becomes known to the government.  
8 The government must also disclose information that can be used  
9 to impeach the trial testimony of a government witness, and  
10 must do so sufficiently in advance of trial in order for the  
11 defendant to make effective use of it at trial.

12 I remind you that these obligations are continuing  
13 ones, and that they apply to information whether or not you  
14 credit it.

15 I further remind you that for these purposes, "the  
16 government" includes any federal, state, and local law  
17 enforcement officers and other officials who have participated  
18 in the investigation and prosecution of the charged offenses;  
19 and that you have an obligation to seek from these sources all  
20 information subject to disclosure.

21 And finally, I caution the government that if it fails  
22 to comply with this order, any number of consequences may  
23 follow:

24 One, I may order production of the information and  
25 specify the terms and conditions of such production.

KC1VTEMC

1           Two, I may grant a continuance.

2           Three, I may impose evidentiary sanctions.

3           Four, I may impose sanctions on any responsible lawyer  
4 for the government.

5           Five, I may dismiss charges before trial or vacate a  
6 conviction after trial or a guilty plea.

7           Or six, I may enter any other order that is just under  
8 the circumstances.

9           Government, do you understand these obligations and  
10 will you confirm that you have fulfilled and will fulfill them?

11           MR. BHATIA: Yes, I understand our obligations. And  
12 we have fulfilled and will fulfill our obligations.

13           THE COURT: All right. Very good.

14           All right. The next preliminary matter that I need to  
15 take up involves a disclosure I need to make that is occasioned  
16 by the appearance of Mr. Biale as new counsel for Mr. Teman.  
17 And the disclosure is that I am acquainted with Mr. Biale.

18           Mr. Biale's wife, Margaret Graham, worked for a summer  
19 at the law firm at which I used to work, and we worked together  
20 closely on a criminal appeal. Ms. Graham and I have kept in  
21 touch over the years, and we have had lunch or coffee several  
22 times since she joined the U.S. Attorney's Office for the  
23 Southern District of New York.

24           Through Ms. Graham I have gotten to know Mr. Biale. I  
25 recall spending an hour or so alone in my chambers with

KC1VTEMC

1 Mr. Biale several years ago discussing his professional options  
2 before he joined the Sher Tremonte firm. I have also  
3 personally appointed Mr. Biale and the Sher Tremonte firm to  
4 represent a *pro se* plaintiff in a case before me in which the  
5 plaintiff sued his lawyer from an earlier matter for allegedly  
6 misappropriating a \$100,000 retainer. Mr. Biale did an  
7 absolutely superb job in that case. I think very highly of  
8 Mr. Biale, and regard myself as something of a mentor of his  
9 and also as a friend.

10 In the interest of full disclosure, I must also put on  
11 the record the sad fact that I attended shiva at Mr. Biale's  
12 apartment in Brooklyn in the summer of 2019. And most  
13 recently, about six weeks ago, on October 10th, I was a  
14 recipient of a group email that Mr. Biale sent to friends and  
15 family announcing the joyous news of the arrival of a new son,  
16 Abraham Ewing Graham Biale; and for which, Mr. Biale, a huge  
17 *mazel tov* to you and Ms. Graham from the Court.

18 All that said, I have absolutely no doubt that  
19 notwithstanding that I am acquainted with Mr. Biale in the  
20 various ways that I have reviewed, these will not in any way,  
21 shape, or form compromise my ability to preside over this case  
22 dispassionately and neutrally and with fairness to all.  
23 Nevertheless, I did need to make this disclosure, as I do in  
24 all cases where I've had a friendship with counsel.

25 Mr. Biale, did you disclose to the government the sum

KC1VTEMC

1 and substance of the facts that I've just reviewed?

2 MR. BIALE: Your Honor, in candor, I did not. But I  
3 appreciate that your Honor has now put that on the record, and  
4 I appreciate what you said.

5 THE COURT: All right.

6 Mr. Bhatia, regardless, you are now on notice of the  
7 information that I have just reported to you. I trust that the  
8 government does not have any issue with regard to the Court's  
9 continuing to preside over this case.

10 MR. BHATIA: No issue whatsoever.

11 THE COURT: All right.

12 And Mr. Biale, just in the interest of full  
13 disclosure, did you disclose to your client the fact that you  
14 and I are acquainted in the ways that I've just reviewed?

15 MR. BIALE: Yes, your Honor.

16 THE COURT: All right.

17 And did Mr. Teman have any concerns about your  
18 representing him in light of all of that?

19 MR. BIALE: He did not.

20 THE COURT: All right.

21 And Mr. Teman, is that correct?

22 THE DEFENDANT: That's correct, your Honor.

23 THE COURT: Prior to this hearing, had you been made  
24 aware of the facts that I have just reviewed with Mr. Biale?

25 THE DEFENDANT: Except that he's owed a *mazel tov*, he

KC1VTEMC

1 was rather candid and helpful to me by sharing his struggles as  
2 encouraging and very helpful in a dark moment for me.

3 THE COURT: I'm not surprised to hear that. I'm glad  
4 to hear that.

5 All right. And it goes without saying, but you are  
6 comfortable proceeding then with Mr. Biale as one of your  
7 counsel?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: All right.

10 That leads me then to a related issue, and this is  
11 going to -- this is the principal reason that I was going to be  
12 unable for us to proceed today.

13 And this issue also involves Mr. Biale, but it  
14 implicates the case of *United States v. Curcio*. And I  
15 apologize in advance for the need to pursue these matters, but  
16 circuit law requires that the Court be attentive to facts that  
17 raise even potential conflicts.

18 Mr. Biale, for the record, am I correct that your  
19 wife, Ms. Graham, is today employed as an Assistant United  
20 States Attorney by the U.S. Attorney's Office for the Southern  
21 District of New York, which is prosecuting your client,  
22 Mr. Teman, in this case?

23 MR. BIALE: That's correct, your Honor.

24 THE COURT: All right. And am I correct that  
25 Ms. Graham has been an employee of the U.S. Attorney's Office

KC1VTEMC

1 at all times since Mr. Teman was indicted in September 2019?

2 MR. BIALE: Yes.

3 THE COURT: All right.

4 Mr. Biale, I need to confirm for the record that  
5 before --

6 UNIDENTIFIED SPEAKER: Your Honor, I just want to make  
7 very clear --

8 THE COURT REPORTER: I'm sorry. Who is speaking? Who  
9 is speaking? Who is speaking? Hello? I'm sorry, who is  
10 speaking? Your Honor? This is the court reporter. Hello?

11 THE DEPUTY CLERK: Judge, it's A.J. I think Martha is  
12 trying to get your attention.

13 THE COURT: Hold on. Somebody is interrupting.

14 THE COURT REPORTER: I'm sorry. I'm not getting any  
15 of this. I don't know who was speaking.

16 (Indiscernible crosstalk)

17 THE COURT: But right now, whoever was cutting in,  
18 please be respectful of the ongoing conversation.

19 THE DEPUTY CLERK: Judge, it's A.J.

20 Martha is unable to hear what you folks are hearing.  
21 Martha is trying to cut in. She is unable to hear you folks.

22 THE COURT: Martha, are you able to hear me right now?

23 THE COURT REPORTER: I'm able to hear you. What I  
24 didn't know is who was speaking, which attorney, when he  
25 started speaking. I did not get any of that.

KC1VTEMC

1                   THE COURT: Okay. Thank you.

2                   We'll back up a moment.

3                   Martha, I put several questions to Mr. Biale about his  
4 wife's employment at the U.S. Attorney's Office, to which he  
5 answered yes. Did you catch that, Martha?

6                   THE COURT REPORTER: Yes, your Honor. It's when the  
7 attorneys --

8                   THE COURT: Mr. Teman interjected. And I think the  
9 challenge there -- no fault here, I think Mr. Teman did not put  
10 his name to his remarks, and that's probably, Martha, why you  
11 didn't know who was speaking. That was Mr. Teman.

12                  Were you able to capture the words that were said?

13                  THE COURT REPORTER: No, because I was busy trying to  
14 interrupt to see who was speaking.

15                  THE COURT: Okay. So, Mr. Teman, just so we can  
16 reprise that, after I said what I said to Mr. Biale and he  
17 confirmed the facts about his wife's employment, what did you  
18 say?

19                  THE DEFENDANT: I spoke up to clarify that I did not  
20 know anything about Mr. Biale's wife and her profession or  
21 anything, other than the loss of a child that he had shared.

22                  THE COURT: Okay. That is my recollection of what  
23 Mr. Teman just said.

24                  And then in response to that, I said, in substance  
25 Thank you, Mr. Teman. That is exactly why I'm undertaking this

KC1VTEMC

1 necessary conversation.

2 Thank you, Martha. I apologize. I didn't realize it  
3 was you who was cutting in.

4 And A.J., I apologize to you. I thought that was  
5 somebody else.

6 All right. So, Mr. Biale, let me just pursue that  
7 with you. Before you took on this representation, was  
8 Mr. Teman notified by you of the fact that your wife is  
9 presently employed by the office that is prosecuting Mr. Teman,  
10 and that she has been employed there during the entire course  
11 of this prosecution?

12 MR. BIALE: Your Honor, I apologize. I don't recall  
13 having a conversation about that with Mr. Teman. And it sounds  
14 like I did not. Perhaps what makes sense is for -- I think  
15 where your Honor is headed, that we should break and have a  
16 discussion with Mr. Teman about this.

17 THE COURT: Well, we're going to do a little more than  
18 that. But, yes, you and I are on the same page.

19 But, look, to be very blunt -- and this is something  
20 that -- this is obviously pivotally important. Mr. Biale's  
21 wife status as an employee of the United States Attorney's  
22 Office for the Southern District of New York -- Mr. Teman's  
23 adversary in this case -- presents a potential conflict.

24 It is, in my judgment, based on my knowledge of the  
25 case law, I believe it to be a completely waivable conflict. I

KC1VTEMC

1 have seen, in fact, at least one instance in which a defendant,  
2 following careful *Curcio* proceedings, resulting in questioning  
3 under oath of the defendant by the Court, knowingly waived the  
4 conflict presented by one of his lawyers being married to an  
5 AUSA in the office that is prosecuting him.

6 Nevertheless, the Second Circuit, as I think all  
7 counsel on the call are aware, has insisted on rigorous  
8 compliance, with a series of steps and procedures that a  
9 district court must use to establish that a defendant wishes to  
10 waive his right to conflict-free counsel.

11 In particular, *Curcio* requires that the Court:

12 One, advise the defendant of the dangers arising from  
13 the particular conflict.

14 Two, determine through questions that are likely to be  
15 answered in narrative form whether the defendant understands  
16 those risks and freely chooses to run them.

17 And three, give the defendant time to digest and  
18 contemplate the risks, after encouraging him or her to seek  
19 advice from independent counsel.

20 And I'm citing the case of *United States v. Curcio*,  
21 680 F.2d 881, 888-890 (2d Cir. 1982).

22 The purpose of those careful procedures is to protect  
23 the defendant and his constitutional right to be free from  
24 conflict-free counsel; and to protect the integrity of the  
25 court proceedings.

KC1VTEMC

1                   Absent a properly conducted *Curcio* proceeding  
2 resulting in a knowing waiver by Mr. Teman of the potential  
3 conflict here -- and it needs to be a waiver that I find  
4 knowing and intelligent -- we simply cannot proceed further  
5 with Mr. Biale representing Mr. Teman.

6                   I confess that I did not spot this issue that defense  
7 counsel is married to a prosecutor at the office that is  
8 prosecuting Mr. Teman until yesterday, after having extensively  
9 prepared for the sentencing. And I spotted it only as I was in  
10 the process of writing up my own narrative about how I know  
11 Mr. Biale; and suddenly it dawned on me that I know him through  
12 his wife, and his wife -- whom I met through a private law  
13 firm -- now happens to be working at the Southern District U.S.  
14 Attorney's Office. And perhaps counsel may have overlooked  
15 this, too.

16                   Let me ask you, Mr. Bhatia, were you aware that  
17 Mr. Biale is married to one of your colleagues?

18                   MR. BHATIA: Yes, I was.

19                   THE COURT: Is there a reason you didn't alert me to  
20 the potential conflict?

21                   MR. BHATIA: I apologize, your Honor. I wasn't aware  
22 this is one of the situations that triggers a *Curcio* hearing;  
23 although now that you mention it, we are happy to proceed and  
24 conduct one.

25                   THE COURT: Mr. Biale, are you also of the view that

KC1VTEMC

1 you didn't think this might be a potential conflict, or it just  
2 didn't -- just sort of blipped on it and didn't think about it?

3 MR. BIALE: So, your Honor, I will say that -- so  
4 Mr. Teman retained Ms. Harris in the summer. And I was brought  
5 into the case a little bit later to assist her. I've obviously  
6 been working closely with her. I am not saying that to suggest  
7 that it was her responsibility to disclose it, but I was not  
8 part of the initial conversations.

9 I certainly understand that this is something that,  
10 had we discussed it before, we wouldn't be addressing it for  
11 the first time with your Honor now.

12 I will say to your Honor that I do not -- I have not  
13 had a situation like this before where a court has conducted a  
14 *Curcio* hearing based on the fact that I'm married to an AUSA in  
15 the Southern District of New York. It may be a best practice.  
16 And, you know, I certainly will consider that going forward.

17 I think what I would propose -- and I don't want to --  
18 THE COURT: Sorry. I'm not looking for a proposal,  
19 because I've got a proposal.

20 I'm trying to understand how it can be that both  
21 counsel in this case who knew that you, Mr. Biale, are married  
22 to somebody who works for the office that is prosecuting  
23 Mr. Teman and trying to put him in prison, didn't think to  
24 raise -- in the case of Mr. Biale with Mr. Teman, in the case  
25 of either of you -- with the Court the potential conflict.

KC1VTEMC

1           I will tell you, based on my knowledge of the case  
2 law, that while this is a waivable conflict, it's unthinkable  
3 that this is not something that merits a *Curcio* hearing.

4           People raise *Curcio* hearings for me when an associate in a  
5 defense law firm is applying to the U.S. Attorney's Office for  
6 employment. This is way closer than that.

7           Look, in any event, lecture notwithstanding, here's  
8 the point: This is exactly the sort of conflict that needs to  
9 be addressed at the threshold before we move forward. Under  
10 Second Circuit law, before a criminal defendant can waive such  
11 a conflict so as to allow the case to move forward, there has  
12 to be the carefully handled set of proceedings that *Curcio*  
13 dictates.

14           Ordinarily, counsel bring this to my attention by  
15 letter beforehand; they alert me to the fact of the potential  
16 conflict. And that can expedite the *Curcio* proceeding by  
17 enabling the Court at the next conference to have the first of  
18 the required two *Curcio* hearings, the first of which the Court  
19 alerts the defendant to the potential dangers presented by the  
20 conflict; at the second in which the defendant, after getting  
21 the opportunity to consult with independent counsel, is  
22 questioned by the Court to establish his awareness of the  
23 problem or the conflict and his willingness to proceed.

24           So here's what I propose: I would be inviting error  
25 to proceed forward here making any substantive determinations

KC1VTEMC

1 in the case with a potential conflict left unresolved.

2                   What I want to have happen is as follows: I want  
3 defense counsel first to review the issue carefully with  
4 Mr. Teman. And Mr. Teman's look of shock was obvious to me,  
5 even from 1,000 miles away on video, when he learned that one  
6 of his lawyers works -- is a colleague of Mr. Bhatia's.

7                   Insofar as this conflict implicates the representation  
8 by the firm of Sher Tremonte, I would urge that Mr. Gelfand and  
9 Mr. DiRuzzo perhaps take the lead in inviting those  
10 discussions, insofar as they are not subject to any such  
11 conflict.

12                  I then expect defense counsel to reach out to the  
13 government. And, government, I expect that you will consult  
14 with the appeals unit in the U.S. Attorney's Office to make  
15 sure that any submission that the Court receives on this point  
16 in substance has been approved by the appeals unit, insofar as  
17 it appears that trial counsel missed the *Curcio* issue, too.

18                  Two weeks from today, December 15, I would like to  
19 receive a joint letter from the parties. It should notify the  
20 Court whether Mr. Teman, after careful consideration, wishes to  
21 proceed with Sher Tremonte on his team. The letter should also  
22 set out the parties' views -- supported by case law -- whether  
23 the conflict here is waivable. I am virtually certain that it  
24 is waivable; but in the interest of due care, I would benefit  
25 from case authority.

KC1VTEMC

1           Assuming that counsel agree that the conflict is  
2 waivable, and that Mr. Teman does agree to waive it and to  
3 proceed with Sher Tremonte, the letter should set out counsels'  
4 proposed procedure, consistent with *Curcio*, for obtaining the  
5 appropriate knowing and voluntary waiver. As I said, *Curcio*  
6 typically envisions a two-hearing procedure. I would welcome  
7 counsel setting out for me in writing the particular questions  
8 that counsel propose that the Court put to Mr. Teman at each  
9 hearing.

10           I hope and expect that counsel -- the government and  
11 defense -- will be able to agree on the proposed procedure in  
12 question. We each have an equal interest here in the integrity  
13 of this aspect of the proceeding. If not, I still want a joint  
14 letter; it should just set out the parties' various agreement  
15 and disagreement.

16           The two weeks, in my estimation, should be enough time  
17 to give Mr. Teman -- in consultation with counsel -- to digest  
18 this news flash, and to reach a thoughtful and informed  
19 conclusion as to whether to proceed with Sher Tremonte on his  
20 team. It should also give counsel enough time thereafter to  
21 meet and confer and make a joint proposal to the Court,  
22 consistent with *Curcio*. However, needless to say, if counsel  
23 on either side -- particularly the defense, but either side --  
24 needs more time than two weeks to consider and work through  
25 these important issues, obviously I'll accommodate that. Just

KC1VTEMC

1 submit a letter seeking such an extension.

2           Upon receiving counsel's letter, if indeed Mr. Teman  
3 wishes to waive his right to conflict-free counsel, I will  
4 schedule a *Curcio* hearing. Mr. Teman, I see -- I think I see  
5 the long face. I understand your frustration and surprise.  
6 Let me just finish.

7           Please understand, I'm protecting your rights, as well  
8 as everyone's right to the integrity of the proceeding. And I  
9 hope you appreciate that while I haven't always ruled for you,  
10 I have tried throughout this proceeding to be attentive to your  
11 rights. You'll recall the dismissal of a count due to speedy  
12 trial issues and the probing questions I put to the government  
13 that resulted in their unilateral dismissal of Counts Five and  
14 Six. This is of the same nature.

15           There is an issue here that adversely affected your  
16 rights. I want to spot it, and I want to give time to make  
17 sure your interests are protected, your rights here at stake.  
18 Because you have a constitutional right to conflict-free  
19 representation. With limited -- one moment, sir.

20           With limited exceptions, a defendant can waive that  
21 right; but under the law, the waiver has to be obtained  
22 pursuant to a careful set of procedures that enables the Court  
23 to assure itself that the waiver was knowing and intelligent,  
24 and received after a period of deliberation. When a conflict  
25 surfaces, it is important that the Court and counsel turn

KC1VTEMC

1 square corners.

2 Mr. Teman, I wasn't intending to call on you at this  
3 point, but just simply to explain myself because I regret this.  
4 But if there's something you need to say, I'll let you do so.

5 But let me just say this: I know your lawyers will be  
6 tensing up each time you offer to say something to the Court  
7 unguided by them. So please, think carefully before you speak,  
8 because your lawyers assuredly would want to confer with you  
9 before you do so.

10 THE DEFENDANT: Your Honor, I appreciate that, and  
11 I'll keep it limited.

12 I don't mean to flatter, but it's impressive that you  
13 can see facial expressions in such a small -- I have a very  
14 small box here on the screen.

15 I'm concerned about an even larger issue, which is,  
16 without going into the details that your Honor is undoubtedly  
17 aware -- and a lot of paper has been exchanged electronically  
18 back and forth, the questions -- the core questions we have  
19 raised about this trial in two words would be prosecutorial  
20 misconduct.

21 And I have just learned that the attorneys  
22 representing me are literally married to the prosecution. I  
23 think that raises a much larger question about the entire case  
24 and privileged communications and strategy and advice I've  
25 gotten throughout this trial.

KC1VTEMC

I want to be candid that I am intending to seek additional outside -- and I don't know how I'm going to afford it; I've put all my money and taken loans to pay full restitution. And I want to note, your Honor, I showed up today virtually with all the money to pay, coming here to beg you for mercy to put an end to this. And now I'm learning that -- and your Honor is aware that we've had very esteemed controversial attorneys like Professor Dershowitz helping us, you may not be aware that Professor Lessig from Harvard Law School has also stepped in to help. Ron Coleman has stepped in to help. Molly McCann, who was just counsel for General Flynn, has stepped in.

I've had very helpful feedback. And now I'm learning that I basically might have had -- even inadvertently, and I believe Mr. Biale is a very good man -- slips of the tongue when you -- you know, I discuss my work with my girlfriend. And it's surprising, given this case, she's still my girlfriend, given the topic.

But I think there's a much bigger concern here, which is we will never, never be able to know what I gave that was privileged to my counsel that was just funneled to people we've accused over and over of cheating. And not only have we accused them of cheating, Professor Dershowitz has accused them of cheating, Ron Coleman has accused them of cheating, Molly McCann has accused them of cheating. They've been accused of cheating. The Southern District of New York has been accused

KC1VTEMC

1 of burying evidence in *U.S. v. Najad*, *U.S. v. Ahuja*. You can  
2 go up and down the halls of the Southern District of New York  
3 and they will talk about these attorneys -- one of whom he's  
4 married to -- emailing each other about "burying evidence."  
5 Professor Outlaw from Vanderbilt and from Howard University  
6 wrote a letter to Judge Nathan, who in full -- I want to have  
7 full --

8 (Court reporter disconnected from call)

9 THE COURT REPORTER: I'm sorry, your Honor? Your  
10 Honor, I was thrown off the call. I just called back. I'm  
11 sorry. The last thing I have --

12 THE COURT: Who is that, the court reporter?

13 THE COURT REPORTER: Yes.

14 THE COURT: How long ago did you drop off the call?

15 THE COURT REPORTER: The last thing I have was the  
16 defendant was saying: Professor Outlaw from Vanderbilt and  
17 from Howard University wrote a letter to Judge Nathan, who  
18 fully wanted to have --

19 THE COURT: One moment.

20 Mr. Teman, because if something is said without the  
21 court reporter, it's as if it didn't happen.

22 THE DEFENDANT: I can repeat it.

23 THE COURT: One moment. Please don't interrupt, just  
24 for the court reporter's benefit, that's all.

25 I will invite you to pick up where you referred to

KC1VTEMC

1 those people.

2           But before you do, I get the gist of what you're  
3 saying. I'm happy for you to complete the thought.

4           There will be time enough to take this up. So  
5 complete the thought as you wish.

6           (Indiscernible crosstalk)

7           THE COURT: Sorry, sir. Please.

8           This is not a day in which I'm resolving anything.  
9 I'm simply putting in place a procedure for communication  
10 within the defense team, between the defense and the  
11 government, and ultimately to the Court. I am deciding nothing  
12 except setting a procedure.

13           So I will ask you, Mr. Teman, understand that this is  
14 not a moment for advocacy. I'm happy to hear what you have to  
15 say. But at the end of all this, all I'm going to be doing is  
16 putting in place a process.

17           Go ahead, Mr. Teman.

18           THE DEFENDANT: Your Honor, I appreciate that. I will  
19 be concise. And I invite the court reporter to shout out if  
20 anything is unclear.

21           She mentioned that I left off on Professor Outlaw --  
22 which is a fantastic name for a professor writing about  
23 criminal trials -- who wrote to Judge -- I'd like to note for  
24 the record the judge cracked up. But anyway -- I am the  
25 comedian sometimes.

KC1VTEMC

1                   But this is a very serious topic, which is that  
2 Professor Outlaw of Howard University and Vanderbilt, wrote to  
3 Judge Nathan and said that quite a sizable percentage of the  
4 Southern District of New York -- I believe the count was  
5 something like 14 members of the staff, multiple supervisors,  
6 and that's just in one trial, *U.S. v. Najad*. And then there's  
7 another trial before Judge Failla, *U.S. v. Ahuja*. And there's  
8 also, I believe, a case before Judge Hellerstein where S.D.N.Y.  
9 coincidentally dumped six terabytes of data right before trial.

10                  And I'll point out that what hasn't been brought up,  
11 but last night, 4 p.m., 9 p.m., somewhere between there,  
12 Southern District of New York disclosed that Bank of America  
13 and they had information pertaining to a \$14,000 transaction or  
14 money that was held, effectively a personal guarantee if the  
15 transaction they allege was illegal. And they go, Oh, we just  
16 got this information November 30th.

17                  Sentencing was supposed to be September 29th. And  
18 your Honor can correct me, but I think it was also supposed to  
19 be sometime in June. And this trial was in January, and the  
20 arrest was in July.

21                  I'm going to sum this up very clearly in bullet  
22 points, which is, I agree, your Honor, I believe a statement  
23 you made once in trial is you tried to be a source of truth and  
24 light. I don't think anybody can look at the behaviors of the  
25 Southern District of New York in this case and across, and the

KC1VTEMC

1 fact that they were married to my defense counsel and failed to  
2 disclose that, combined with all of the facts relating to  
3 magically late and -- excuse me, late disclosure is actually  
4 not accurate, because I think your Honor will agree, sentencing  
5 was supposed to happen half a year ago. And magically, they  
6 discovered a \$14,000 drawdown, effectively changing the case,  
7 effectively now it's not going -- it went to the bank, and I  
8 said, I'm going to take this money.

9 They said, Well, you're not entitled to this money.

10 Basically, the whole case changes to, I went to the  
11 bank and said I believe we're contractually obligated, I'm  
12 putting that right here on the document; I'm chatting with you  
13 for an hour. And in addition to that, I understand that if I'm  
14 wrong or, in the government's view, I'm dishonest, I personally  
15 stand to lose \$14,000.

16 I've got -- and I'm not waiving privilege here --  
17 tremendous pushback on strategy and ideas. And if I knew that  
18 my defense counsel was married to the opposing team, I wouldn't  
19 have hired them.

20 And right now, I think what can be clear -- and  
21 everybody from the outside can admit -- and I'm going to end on  
22 this, I don't think any defendant should have to learn this now  
23 at this stage and believe that all the post-trial motions and  
24 God knows what else Southern District of New York hasn't yet  
25 disclosed and refused to disclose to us.

KC1VTEMC

1                   Mr. Biale implicitly admitted that they haven't  
2 disclose all information. Mr. Biale, I believe, was on his  
3 second trial in this case. He's a young man. He didn't choose  
4 to lie to your Honor's face over and over as he did. He was  
5 coached by a supervisor at the Southern District of New York.  
6 And now you're asking me to be tried because someone was  
7 married.

8                   I am sure when we come back, we're going to be asking  
9 for at least a different venue. Thank you, your Honor.

10                  THE COURT: All right.

11                  Look, thank you, Mr. Teman. You covered a lot of  
12 ground there, and I don't propose to address everything you  
13 covered. My focus here is this case, not other matters.

14                  You said a moment ago that your counsel -- I think you  
15 used the plural -- were married to an AUSA. To be clear, I am  
16 unaware that Mr. DiRuzzo or Mr. Gelfand, your trial counsel, or  
17 Ms. Harris, your other post-trial counsel, have any such  
18 relationship with anyone at the Southern District of New York.

19                  The potential conflict issues that I flagged, as I  
20 understand it, is limited to Mr. Biale. You're at liberty to  
21 examine with the other lawyers whether their spouses or  
22 partners are employees of the Southern District, but my guess  
23 is the answer will prove no.

24                  And so while I appreciate what you have said, the  
25 issue that I raised is a tight and narrow one that involves

KC1VTEMC

1 Mr. Biale's ability -- and, therefore, that of his law firm --  
2 to represent you without a knowing and intelligent waiver. It  
3 does not in any way, shape, or form potentially implicate  
4 anything that occurred in this matter before Mr. Biale joined  
5 the defense team.

6 I will be, a little later on, raising with counsel  
7 some questions I have about the forfeiture and restitution  
8 filings that I received in the last few hours. I hadn't  
9 thought about whether the issue had been that the government  
10 had had them all along and just produced them, so much as just  
11 the rudeness of their coming in in the last 24 hours, which is  
12 necessitating everybody recognizing the need for an  
13 adjournment. I hadn't thought of that as any form of a late  
14 disclosure issue. I'm happy for counsel to confer about that  
15 and to receive a submission on that point.

16 But for now, the issue that I flagged is simply  
17 presented by the fact that since the Sher Tremonte firm has  
18 been part of the case -- or at least since Mr. Biale has been  
19 part of the team -- there is this *Curcio* issue that arises.  
20 And so for that reason, I need to hit the pause button on all  
21 this to run that to ground.

22 In the fullness of time, Mr. Teman, you should speak  
23 with, in particular, your independent lawyers, Mr. Gelfand and  
24 Mr. DiRuzzo, who I also esteem very --

25 THE DEPUTY CLERK: Your Honor, I apologize. I don't

KC1VTEMC

1 know if anybody else -- you've frozen completely.

2 I'm going to reach out to Judge Engelmayer very  
3 quickly. Hold on one moment.

4 (Pause)

5 THE COURT: All right.

6 Just simply, yes or no, Mr. Teman, can you hear me?

7 THE DEFENDANT: Yes, your Honor.

8 THE COURT: Mr. Bhatia, can you hear me?

9 MR. BHATIA: Yes.

10 THE COURT: Mr. Biale, can you hear me?

11 MR. BIALE: Yes, your Honor.

12 THE COURT: Court reporter, can you hear me?

13 THE COURT REPORTER: Yes, your Honor.

14 THE COURT: Okay.

15 And court reporter, did you lose any -- did you at any  
16 point lose the audio or were you able to hear everything?

17 THE COURT REPORTER: I heard you up until you froze.

18 THE COURT: Okay. I don't know when that was. What  
19 was the last thing that you recorded my saying?

20 THE COURT REPORTER: Let me just look at it. Hold on  
21 one minute please.

22 THE COURT: Keep your voice up. I'm having difficulty  
23 hearing you from a volume perspective.

24 THE COURT REPORTER: Okay. I'm just looking at it.

25 "In the fullness of time, Mr. Teman, you should speak

KC1VTEMC

1 with your independent lawyers, Mr. Gelfand and Mr. DiRuzzo, who  
2 I also esteem very," and that was it.

3 THE COURT: Very highly.

4 I have no doubt that they have your best interests at  
5 heart and are independent of the potential conflict I  
6 identified. You should speak with them about your best  
7 interests, whether to use one of the other lawyers who is  
8 assisting you, whether to waive the conflict and go with the  
9 Sher Tremonte firm, or do something else. And I don't weigh in  
10 on that, I just am trying to police the conflict process here  
11 to make sure that your right to conflict-free counsel is  
12 respected.

13 I do though need to say this, which is that your very  
14 estimable trial counsel, who are unaffected by any conflict,  
15 have thoroughly raised the issues that you had flagged under  
16 *Brady v. Maryland* in this case. And as the lengthy post-trial  
17 decision that I rendered reflects, I found those claims of  
18 misconduct to be meritless.

19 I do not preclude your exploring with your counsel the  
20 thesis -- if you think it worth exploring -- that some  
21 sentencing materials on account of the relationship here were  
22 shared in some way from Mr. Biale to Ms. Graham to Mr. Bhatia,  
23 I have zero reason to think that that happened, but you're at  
24 liberty to make inquiry about that through independent counsel,  
25 but this call is not the time to do that.

KC1VTEMC

1                   Mr. Teman, hold on.

2                   This is also not a time for speech-making.

3                   I am here to protect your rights. And your right  
4 principally involves at this point going offline, speaking with  
5 your independent lawyers, and deciding how you want to proceed  
6 as to representation. And I will be happy to hear from the  
7 counsel who emerge ultimately from that process if there's some  
8 new issue presented by the Sher Tremonte firm's role in the  
9 case that needs to be explored.

10                  But, once again, I just want to emphasize, just to  
11 lend some reality to this, that that firm has been post-trial  
12 counsel only. There's no reason I have to think that the jury  
13 trial that resulted in a conviction on all counts was in some  
14 way compromised by the fact that Ms. Biale happens to be --  
15 Mr. Biale happens to represent -- married to Ms. Graham.

16                  In any event, the point is that I've now put in place  
17 a procedure. Counsel are to write me a joint letter in 14  
18 days. In the event the determination is not to seek to waive  
19 the conflict -- and that's your right -- let me know how  
20 counsel propose jointly to proceed.

21                  And, Mr. Teman, it may be that for financial reasons  
22 or just due diligence reasons or needing to take a deep breath,  
23 you need more time. I'll be happy to give that to you. As  
24 you're going to hear in a few moments, I think there are very  
25 good reasons sounding in public health and safety why you might

KC1VTEMC

1 want to slow this process down. We'll see.

2           But the bottom line is this is between you and your  
3 counsel. I do not want anymore speeches made. It only runs  
4 the risk that something you would say would be something that  
5 your eventual counsel will regret that you said.

6           Okay. So having taken care, then, of the *Curcio*  
7 issue, I want to give counsel a heads-up that once we resolve  
8 that representation issue -- whether it turns out to be a  
9 *Curcio* waiver or a substitution of counsel or a reversion just  
10 to using estimable trial counsel, however it works out -- I am  
11 likely to commission letter submissions from counsel on two  
12 areas relating to sentencing. And I'm going to set a schedule  
13 for all this once the dust settles on the representation  
14 issues. Affirmatively, I do not want any submissions from  
15 anybody on these issues until the representation issue is  
16 settled.

17           The first involves forfeiture and restitution.

18           For reasons that are completely puzzling to me, at the  
19 very last minute yesterday, as Mr. Teman said, after sentencing  
20 had been scheduled and rescheduled and pending for months, I  
21 received a flurry of three letters, initiated by one from the  
22 government, debating forfeiture and restitution. And then less  
23 than an hour before sentencing, I received a chart with some  
24 data, I gather, from the bank victim in this case.

25           Needless to say, given the last-minute nature of the

KC1VTEMC

1 submissions, I have not had a full opportunity to study the  
2 issue. And in subject of best practices, this is not the way  
3 to go, government, to start teeing that stuff up the day before  
4 sentencing.

5 At this point I am simply uncertain as to the legal  
6 and factual bases for an award of forfeiture here, on top of an  
7 award of restitution. I just haven't looked into it or  
8 explored it; and the rather threadbare letters I've gotten  
9 don't give me enough to go on.

10 It's also frankly unclear to me from the letters  
11 whether the government is, in fact, seeking separate awards of  
12 forfeiture and restitution, how they relate to each other, if  
13 there is a legal basis for compounding both here, and  
14 whether -- if the government is seeking both, whether the Court  
15 has the legal authority or the discretion to decline to order  
16 the forfeiture on the grounds that on the circumstances here  
17 it's essentially a replica of restitution.

18 I'm still formulating the full range of (inaudible) on  
19 which I will eventually need guidance from counsel. But I  
20 expect that once the *Curcio* or representation issue is done, I  
21 will commission letter briefing on this issue that was  
22 belatedly exposed to me in the last 24 hours. And I will  
23 certainly insist that the briefing be complete materially in  
24 advance of the eventual sentencing date.

25 All right. The second area in which I'm likely to

KC1VTEMC

1 solicit presentencing briefing involves whether Mr. Teman is  
2 going to qualify for bail pending appeal. And the reason is  
3 that it may be important to the Court in determining the just  
4 and reasonable sentence to know whether Mr. Teman is likely to  
5 serve some of the prison sentence during a time when prison  
6 conditions are more restrictive than usual as a result of the  
7 pandemic, or whether any such sentence would first begin to be  
8 served after the appellate process has run its course and when,  
9 God willing, the pandemic has also hopefully run its course.

10 As counsel may be aware, I believe that the pandemic  
11 is an important factor that a just court must take account of  
12 at sentencing, just as it must in evaluating relevant in the  
13 last number of months petitions for compassionate release. As  
14 counsel are probably aware, I personally granted a large number  
15 of compassionate release applications during the pandemic. In  
16 imposing sentences during the pandemic, I have imposed sentence  
17 in a number of cases in which the defendant had been in custody  
18 since the pandemic walloped New York beginning in mid March.

19 As you are all aware, the conditions in federal  
20 prisons have been uncommonly hard during the pandemic. At the  
21 MCC and the MDC, the local jails, where in-custody defendants  
22 awaiting sentence in this district are typically held, such  
23 conditions have been particularly onerous and, on several  
24 occasions, have resulted in lengthy lockdowns. To prevent the  
25 spread of COVID, there have been restrictions on inmate

KC1VTEMC

1 movement, and on visits from family and counsel. There have  
2 also been restrictions to aimed at safeguarding health in  
3 various FCIs, federal correction institutions, in which  
4 defendants are generally designated after sentencing.

5 I have repeatedly taken those harsh conditions into  
6 account in imposing sentence. I have repeatedly said in  
7 sentences over the last eight months that time spent in custody  
8 during the lockdown conditions necessitated by a pandemic is  
9 necessarily harder time than Congress or anyone ever envisioned  
10 or intended prison time to be.

11 And so in deciding on the just sentence, I have taken  
12 the view the defendants who have endured custody in such  
13 circumstances are entitled -- all else equal -- to lower  
14 overall sentences than would otherwise be the case. In other  
15 words, in calculating the sentence, I have informally given  
16 defendants credit for more than one day for each day spent in  
17 custody. And the same logic applies to a defendant whose term  
18 of prison custody has not yet begun, but is likely to begin  
19 while the pandemic is still ongoing.

20 So it will be an important data point for me, in  
21 calculating the just and reasonable sentence, to factor in  
22 whether Mr. Teman does or does not satisfy the requirements for  
23 bail pending appeal. If he does satisfy those standards, given  
24 the typical life cycle of a criminal appeal in the Second  
25 Circuit, his prison term is less likely to be spent during

KC1VTEMC

1 pandemic lockdown conditions than if he does not satisfy those  
2 standards.

3 For obvious reasons, I do not want to receive any such  
4 submissions from counsel until the representation issue has  
5 been squarely resolved. But I'm giving all of you -- including  
6 potentially counsel yet to be retained -- a heads-up that once  
7 the representation issue is resolved, I am likely to set a  
8 schedule for such submissions. And I will, in the order that I  
9 issue, likely try to put a sharp point on any particular issues  
10 that would be of assistance to me for counsel to address.

11 And I want to ask defense counsel -- I'm here  
12 addressing myself not just to the present defense counsel, but  
13 to anyone who may later join Team Teman of the following one  
14 issue that is important and relates to sentencing. And again,  
15 Mr. Teman, I'm looking out for you.

16 The issue is whether it makes sense and it is in  
17 Mr. Teman's best interest to hold sentencing soon after the  
18 conflict issue, the representation issue, is resolved, or  
19 whether it makes better sense to put sentencing off, and here's  
20 why:

21 I am acutely aware that the COVID pandemic is  
22 currently at a peak. I'm aware that Mr. Teman has heightened  
23 exposure to COVID, given his history of respiratory issues.

24 Before sentencing takes place, the standards governing  
25 Mr. Teman's release are set by Title 18, United States Code,

KC1VTEMC

1 Section 3143(a). And I found that Mr. Teman meets those  
2 standards, which allows him to stay at home where he and  
3 probably the rest of the country are likely most safe during  
4 COVID.

5 Once sentencing occurs, however, for Mr. Teman to  
6 remain at liberty -- barring the time spent between sentencing  
7 and surrender date -- all that will require him to satisfy a  
8 different statute, Title 18, United States Code, Section  
9 3143(b). And that statute, the bail pending appeal statute,  
10 requires Mr. Teman to identify substantial questions on appeal  
11 that would likely lead to reversal or a new trial as that  
12 standard has been articulated by the Second Circuit in the  
13 foundational case of *United States v. Randell*, 761 F.2d 122,  
14 (2d Cir. 1981).

15 I am not prejudging that question. I will be eager to  
16 hear what counsel have to say about that. But, in the interest  
17 of candor, I will say that I am familiar with the issues in  
18 this case. I resolved the extensive post-trial motions  
19 litigated by Mr. Gelfand and Mr. DiRuzzo. And I denied all  
20 those motions in a 27-page decision I issued on June 5th  
21 docketed at docket 138.

22 Based on the issues that have been put to me so far,  
23 at present, I'm not seeing a question or legal issue that rises  
24 to the *Randell* standard. Again, I could be wrong. I'm happy  
25 to be briefed. But I'm quite well familiar with the issues

KC1VTEMC

1 (inaudible) --

2 THE COURT REPORTER: I'm sorry. I'm sorry, your  
3 Honor? Your Honor? Okay.

4 THE COURT: -- Section 3145(c) of Title 18, which  
5 permits release where "exceptional reasons exist," which this  
6 Court has cited in allowing the pretrial release of various  
7 prisoners during COVID, alas, does not eliminate the  
8 requirement that a defendant who is between sentencing and  
9 appeal establish the existence of a substantial question under  
10 3143(b).

11 So I would ask the defense, present and future, to  
12 consider thoughtfully whether it really is in Mr. Teman's best  
13 interest to proceed to sentencing now. The pandemic right now  
14 is surging across the country. It may continue to surge for  
15 some time. I am open to putting off the sentencing date, and  
16 hopefully this dreadful public health situation will begin to  
17 abate before long.

18 And during the period between before sentencing, that  
19 requires -- that, rather, enables Mr. Teman to remain out of  
20 custody, provided only that he continues to comply with the  
21 existing conditions of release that have been set, which he has  
22 shown an inability to comply with.

23 A number of my colleagues have handled this very  
24 situation in this very way, by adjourning the sentencing dates  
25 of defendants who are currently released on conditions of bail.

KC1VTEMC

1 I'm willing to do that here. I'm open to an adjournment.

2 So I ask defense counsel to reflect, in consultation  
3 with Mr. Teman, and take that up with Mr. Teman. And after the  
4 completion of the representation determination, if you will, I  
5 expect to issue an order confirming that, after thoughtful  
6 consultation between defendant and counsel, I would like to  
7 understand what Mr. Teman's judgment is as to whether to  
8 proceed or seek an adjournment until hopefully that the  
9 pandemic is in (inaudible).

10 So with that, I have nothing further for now. But  
11 those are important issues that I want counsel to consider.

12 With that, I'm going to go around the horn to see if  
13 there's anything else that needs to be addressed. But if there  
14 is nothing else, I will expect a joint submission on December  
15 15th, whether relating to the *Curcio* issue or, if that is  
16 mooted, whether as to the next step in progress in the case.

17 Mr. Teman, I'm mindful that if you wind up in the hunt  
18 for new counsel, two weeks may not be enough. Rest easy. I'm  
19 not forcing your hand here. If you need the time, you'll get  
20 it.

21 With that, let me just go around the horn, beginning  
22 with you, Mr. Biale. I Appreciate that all of this appears to  
23 have come as a surprise to you, notwithstanding my comment  
24 earlier that it ought to have been flagged for me earlier.  
25 Knowing you well, as I do, I have 100 percent confidence in

KC1VTEMC

1 your integrity and have no doubt -- despite what was said by  
2 Mr. Teman -- of your good faith, independence, integrity, and  
3 commitment to him. Nevertheless, the nature of conflicts is  
4 that potential conflicts need to be run through this process.

5 Is there anything else you want to put on the record  
6 or say at this point?

7 MR. BIALE: Understood, your Honor.

8 Not at this time. Thank you.

9 THE COURT: Mr. Bhatia, anything from you?

10 MR. BHATIA: Obviously we'll take all the comments  
11 from today into account and speak with counsel, whoever that  
12 may be.

13 One thing to flag for your Honor is there was some  
14 question about adequate notice for forfeiture. To the extent  
15 sentencing is now adjourned, we may want to give that notice  
16 sooner rather than later. The issue is a notice one.

17 So I'm just flagging for the Court and for the defense  
18 that we may do that; but it's not with the intention of  
19 catching anyone in a period of transition. But if the question  
20 is notice, we hope to give that -- make sure that everyone is  
21 on notice now.

22 THE COURT: Mr. Bhatia, I've already directed that.  
23 Essentially, I said that once we've sorted out the  
24 representation issue, one of the areas in which I need  
25 considerably more input from both sides -- but in the first

KC1VTEMC

1 instance, the government -- involves restitution and  
2 forfeiture. It follows that on the schedule I set, you will  
3 have your opportunity to say your piece, and Mr. Teman's  
4 counsel will have their opportunity to.

5 And all those will be submitted with finality  
6 sufficiently in advance of sentencing so that each side isn't  
7 dealing with movable parts here, and they know what the sum and  
8 substance of the submissions are, and I, in turn, will be able  
9 to get the answer right.

10 But it's no way to promote accuracy and  
11 decision-making to dump stuff on a court in the way that  
12 happened in the last 24 hours. And so this time, by court  
13 order, I will insist that everything be submitted meaningfully  
14 enough in advance so that I can do my job right.

15 MR. BHATIA: Obviously we will comply with the Court's  
16 schedule. I wasn't sure if the Court wanted us to write extra  
17 notice under 32.2, sort of, as soon as possible. We'll stick  
18 with the schedule that you've laid out.

19 THE COURT: All right.

20 I thought I was crystal clear. I do not want any  
21 substantive submissions in the case until the representation  
22 issue is sorted out. It's a lot easier to sort this out and to  
23 not compound any issue if you are communicating or sending  
24 stuff to Mr. Biale while he is subject to an as yet unwaived  
25 conflict. So I would much sooner just hit the power save

KC1VTEMC

1 button on anything of substance until the representation game  
2 of musical chairs has come to a close. Okay?

3 MR. BHATIA: That makes perfect sense. Thank you.

4 THE COURT: All right.

5 Mr. Teman, I strongly discourage you from saying  
6 anything further; nonetheless, this concerns you. If there's  
7 something you feel must be said, mindful that your counsel are  
8 no doubt channeling me in saying, Don't say it, I give you the  
9 floor.

10 THE DEFENDANT: Your Honor, thank you.

11 I want to just put on the record that I retained  
12 Justine Harris. I didn't know -- know them. But I retained  
13 Sher Tremonte specifically to deal with the topic of *Brady*  
14 violations and other related S.D.N.Y. cheating as I've  
15 addressed, having nothing to do with sentencing. In fact, they  
16 have made clear that they just volunteered out of the goodness  
17 of their heart to show up to sentencing.

18 And what a surprise party it has been.

19 Second, I can't speak to technicalities and  
20 legalities, but this idea that now S.D.N.Y. gets additional  
21 time to correct an error of disclosure, I'll note that their  
22 disclosure where they say they got information from Bank of  
23 America, said they got it December 30th of 2020. So we're  
24 still on Skype, but they have time travel.

25 It just seems like every single time in this case

KC1VTEMC

1 S.D.N.Y. messes up and then they cheat to get it in anyway,  
2 witnesses have fled the country, etc. I just want to note that  
3 for the record.

4 I very much expect to show up with new counsel. And I  
5 don't know of the technical means of doing this, but I very  
6 much expect to ask for some sort of outside independent  
7 hearing, whether it's an ablit (ph) court. You have a personal  
8 relationship with this guy. He does a major significant thing.  
9 And, your Honor, it may be all accidental, you know? Like  
10 hiring the wrong person at a company who leaks information to a  
11 competitor, that might be all accidental, but it's still a spy  
12 on the team. And this is shocking.

13 So that's all I'm going to say. Thank you.

14 THE COURT: All right. Look, Mr. Teman, we have a  
15 process for the resolution of claims. It's called litigation  
16 before the district court. If either party is dissatisfied  
17 with the resolution that I reach, we have a process called  
18 appeal. That's what we will do here.

19 You are at liberty to pursue with counsel or successor  
20 counsel any grievances you have. Counsel, binded by their  
21 obligations not to bring privilege claims before the Court, are  
22 at liberty to pursue claims. And if you have a good-faith  
23 basis to think that this is other than appears to the Court,  
24 which is simply a failure to raise with the Court the issue of  
25 a marital relationship, and if you really believe that there's

KC1VTEMC

1 a basis for believing that you have a spy in your kip, you're  
2 at liberty to pursue that through independent counsel, they are  
3 empowered to make motions before me, and we'll litigate that in  
4 the proper way. I can't foresee the means by which any such  
5 issue will be litigated until something is before me.

6 But there's a process for that. I hope, if nothing  
7 else is clear to you, I hope it's obvious from you today that I  
8 am trying to protect your rights in this process, and I will  
9 continue to do so, including in the context of any claim you,  
10 through counsel, should choose to raise.

11 With that, I look forward to hearing from everybody in  
12 two weeks. I want to wish everybody continued good health for  
13 you and your families.

14 And Mr. Teman, I regret that, you know, the challenge  
15 of being a criminal defendant at this time has been compounded  
16 by the challenge of being, you know, cooped up in a worldwide  
17 pandemic with all the concerns that must be on your mind. So  
18 you're in my thoughts.

19 In any event, we stand adjourned.

20 I look forward to a joint submission two weeks from  
21 now. In case I haven't made it clear enough though, no  
22 substantive submissions until we've sorted out the counsel  
23 issue. I will issue a bottom-line, one or two-sentence order  
24 reflecting the bottom-line outcome here.

25 We stand adjourned. Thank you.

(Adjourned)